

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE BRITISH COLUMBIA COURT OF APPEAL)

BETWEEN:

JOHN MICHAEL KAPP, ROBERT AGRICOLA, WILLIAM ANDERSON,
ALBERT ARMSTRONG, DALE ARMSTRONG, LLOYD JAMES
ARMSTRONG, PASHA BERLAK, KENNETH AXELSON, MICHAEL BEMI
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(Interveners)**

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PART I: STATEMENT OF FACTS

1. The Assembly of First Nations (hereinafter referred to as the “AFN”) accepts the Statement of Facts in the Respondent’s factum.

PART II: POINTS IN ISSUE

2. The AFN accepts the issues as set out in the Respondent’s factum.

PART III: ARGUMENT

The First Nations character of this case requires that the contextual framework set out in *Law* be expanded to include additional factors of fundamental importance

3. The AFN proposes that the s. 15(1) contextual framework, set out in *Law v. Canada*,¹ should be expanded to include several additional contextual factors of fundamental importance in this case.

4. These factors are:

- the multi-jurisdictional nature of Canada, including the distinctive role within it of First Nations’ governments. The fact that differing political communities have varying rights of self-government and resource allocations is a routine and positive fact of Canadian constitutional order. Some differential treatment of individuals is an inevitable consequence of such pluralism, and not a degradation of human dignity;
- the recognized and important federal policy objective of promoting First Nations’ self-governance and economic self-sufficiency; and
- the development of economic self-sufficiency and self-governance are dynamic and evolutionary processes, which will frequently involve experiments and innovations, through which new arrangements can be tested and then refined.

¹*Law v. Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497 (“Law”); see also *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 (“Corbiere”), at para. 54, where this Court has noted any *Charter* equality analysis relating to Aboriginal people must always proceed with consideration and respect for Aboriginal heritage and distinctiveness, and recognition of Aboriginal and treaty rights.

*Factum of The Intervener,
The Assembly of First Nations*

5. In light of these additional contextual factors, the AFN submits that the Pilot Sales Program at issue in this case, which conferred fishery co-management and dedicated fishing periods for three First Nations, was compatible with s. 15(1) of the *Charter*.

The Multi-jurisdictional Nature of Canadian Constitutionalism, including First Nations' Governments

6. The *Charter* and the rest of the constitution of Canada cannot be read as separate solitudes, but must be considered together. In some cases, a section may preclude the application of the *Charter* entirely;² in other cases, the different parts of the constitution should be read together to produce a harmonious overall framework. Consequently, rights under s. 15(1) must be interpreted in concert with distinctive rights and roles that apply to First Nations and the federal government found elsewhere in the constitution.³

7. Canada is made up of a range of political communities and governments, with their own self governing authorities. A government linked to a particular community (provincial, territorial, municipal, First Nations) may be especially knowledgeable about local conditions; more responsive to those concerns than a more distant government or one encompassing more diverse interests; more readily held accountable by constituents; and have a distinctive legitimacy in their eyes that produces a higher level of comfort with decisions, and with that, a higher level of not only compliance but active cooperation.

8. Distinctive treatment of Canadians is an inevitable consequence of the multi-jurisdictional nature of Canada. A person resident in one province may have to pay much higher taxes than an almost identical counterpart in another. Within a single province, workers who are a few meters away may - depending on whether they are in a federal or provincially regulated industry - benefit or suffer from different minimum wage laws. This Court has acknowledged

² *Reference re Bill 30, An Act to Amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148; see also *Adler v. Ontario*, [1996] 3 S.C.R. 609; in contrast see the dissenting opinion of Justice Lebel, in *R. v. Demers*, [2004] 2 S.C.R. 489, where he urged rejection of the “separate silos” approach to constitutional analysis. He advocated using the *Charter* as a “new lens through which [division of powers] should be viewed.”

³ These rights include s. 25 of the Canadian *Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 (“Charter”); s. 91(24) of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 and s. 35 of the *Charter*.

that the federal government has the right to leave space for differential treatment of Canadians based on the programs and policies of a provincial government,⁴ or even a purely local political community.⁵ Provinces may authorize differential treatment of their citizens based on the regulatory preferences of municipal governments.⁶

9. Canada's multi-jurisdictional system includes First Nations' governments, which exist in various forms: band authorities, under the *Indian Act*;⁷ governments recognized under self-government agreements and implementing legislation;⁸ and governments with authority under constitutionally-recognized self-government agreements.⁹ While it is the position of the AFN that First Nations have inherent and constitutionally protected rights to self-government, which have been recognized by the federal government of Canada in their Inherent Rights Policy,¹⁰ and within negotiated self-government agreements,¹¹ the precise scope of such rights do not have to be determined in this case. It is sufficient to recognize that First Nations governments exist, and that they play a key role in achieving the reconciliation discussed in the line of cases from *Delgamuukw v. British Columbia*¹² to *Haida Nation v. British Columbia (Minister of Forests)*.¹³

10. A consequence of a multi-jurisdictional system is that Canadians may be subject to differential treatment depending on the governing rights and resources available to the political communities to which they belong. These rights and resources may vary with the constitutionally

⁴ *R. v. Turpin*, [1989] 1 S.C.R. 1296 ("Turpin").

⁵ *Reference Re Temperance Act, 1872 (Can.)*, [1882] J.C.J. No. 1, at paras. 24-26.

⁶ *Siemens v. Manitoba*, [2000] M.J. No. 417 (MB Q.B.).

⁷ *Indian Act*, R.S.C. 1985, c. I-5 ("*Indian Act*").

⁸ Westbank First Nation Self-Government Agreement, signed on October 3, 2003; *Westbank First Nation Self-Government Act*, S.C. 2004, c. 17.

⁹ See, e.g., *The Nisga'a Final Agreement Act*, S.C. 2000, c. 7 which states in s. 3: "The Final Agreement is a treaty and a land claim agreement under sections 25 and 35 of the *Constitution Act, 1982*."

¹⁰ Indian and Northern Affairs Canada, "The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government" ("Inherent Right Policy") (Ottawa: Minister of Public Works and Government, 1995), online: http://www.ainc-inac.gc.ca/pr/pub/sg/plcy_e.html#Intro (date accessed: Nov 9, 2007), where the Government of Canada recognizes "the inherent right of self-government as an existing right within section 35 of the *Constitution Act, 1982*".

¹¹ See footnotes 8 and 9; see *Campbell et al v. AG BC/AG Cda & Nisga'a Nation et al*, (2000) BCSC 1123.

¹² [1997] 3 S.C.R. 1010.

¹³ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511.

entrenched rights of a particular jurisdiction,¹⁴ or in accordance with inter-jurisdictional arrangements, or as in this case, the extent to which the federal government delegates or recognizes the governing authority of a First Nation.

11. For the purpose of the *Charter*, inter-jurisdictional arrangements - with respect to both finance and governance - should almost always remain matters left to political negotiations and remedies. The past reluctance of this Court to adjudicate fiscal policy reflects the reality that the complex policy judgments, and trade-offs involved in such decisions, are best left to processes that are flexible and democratically accountable, rather than litigation. The AFN submits that this Court should exercise caution before using the *Charter* to adjudicate disputes over whether the federal government has been fair in its level of transfers to various provinces, territories, municipalities or First Nations governments, or as in this case, where it has exercised its discretion to issue licenses, and the correlating monitoring and documenting obligations, to select First Nations' governments, pursuant to negotiations with those governments.¹⁵

12. The AFN does not say that there can never be a *Charter* case based on discriminatory levels of inter-jurisdictional transfers, or where the government has exercised its discretion inappropriately. First Nations might wish to challenge serious inequalities in inter-jurisdictional transfers that are visited on some of Canada's most vulnerable and materially impoverished peoples, such as the level of federal or provincial transfers to First Nations in respect of child and family services. The record in this case does not, however, establish anything remotely resembling the kind of serious inequality that would warrant judicial intervention using the *Charter*. On the contrary, the allocations to the First Nations were reasonable and equitable.

13. The Appellants use the language of "race based" allocations to describe the Pilot Sales Program with a view to establishing the demeaning nature of the program to those who did not receive the First Nations governments' communal licenses. Such characterization is not accurate. The allocation of licenses and corresponding management obligations in this case was not based

¹⁴ *Turpin, supra.*

on race or individual characteristics; it was based on the existence of First Nations as distinctive political communities. The allocations to First Nations' governments were entirely consistent with the multi-jurisdictional nature of the Canadian order and the proper and evolving role of First Nations' governments within it. The policy, under the Aboriginal Fishing Strategy, of negotiating fishing allocation Agreements with "Aboriginal organizations," resulted in approximately 70 communal licenses of varying terms and conditions being issued to *Indian Act* bands, including the Musqueam, Burrard and Tsawwassen First Nations.¹⁶

14. "Race", or more properly ethnic origin, is not definitive of whether a person is, or is not, a member of a band. Band membership is determined either by the federal government, under *Indian Act* rules, based on the degree of inherited legal status, or by a band's own membership code, which could permit an individual of non-Aboriginal ancestry to join a band list by virtue of marriage to a band member or voluntary affiliation and community acceptance.¹⁷ Membership in a band is therefore tantamount to citizenship in a state than it is to ethnicity. The latter refers to belonging to a culturally and perhaps genetically related group. Citizenship refers to belonging to a political community with a set of legal rights that are recognized by the group's own legal system and those of other communities. In the instant case, the allocation of rights and resources is first and foremost among distinctive political communities. Membership in such communities is a secondary matter - a necessary route to accessing the fishing rights recognized by federal law and policy with respect to First Nations, as self-governing entities, not with respect to individuals as such.

15. The Appellants' submission is that the allocations are not "communitarian" because bands did not require remittances to the band itself. The claim is not tenable. The First Nations' governing authorities, not individuals, were responsible for designating who obtained licenses and for monitoring compliance with overriding federal laws. By doing so, the communities

¹⁵ See *Turpin, supra*, where Parliament left it to provinces whether to establish diversion programs.

¹⁶ Respondents' factum, para.22.

¹⁷ See Megan Furi and Jill Wherret, "Indian Act Status and Band Membership Issues," paper delivered to Parliamentary Research Branch, Political and Social Affairs Division, February 1996, revised 2003, online <http://www.parl.gc.ca/information/library/PRBpubs/bp410-e.pdf> (date accessed Nov 8, 2007).

distributed, among their members, opportunities to develop and exercise skills, earn income, carry on in a commercial context an activity (fishing) that is incontestably part of the First Nations' traditional ways of life. The Matkin Report,¹⁸ on the Aboriginal Fishing Strategy program, reports that:

The majority of aboriginal participants were offended by this ["racially based"] characterization of their historical participation in the fishery. In our focus groups with First Nations, they asked if it was common for Canadians when they negotiated international free trade arrangements with other countries such as the United States, Israel or Japan to use this language of race.

16. The test of whether a law or policy is "discriminatory" for the purposes of the *Charter* includes objective as well as subjective elements. The fact that some opponents of the program consider it a "race based" affront to their individual dignity is not in itself determinative. The appropriate and reasonable characterization of the contested program is that it allocated a particular set of management responsibilities and fishing days to First Nations governments; did so for legitimate reasons that included recognition of the historic practices, continuing existence and forward looking aspirations of the communities involved, and the pursuit of the common interest in an effective fisheries' conservation system; and did not make any stereotyped or adverse assumptions about the abilities or character of either the members of the First Nations communities or those outside of it.

Working with First Nations to develop First Nations self-governance and economic self-sufficiency and to resolve land claims are recognized and important objectives of the government of Canada

17. In its 1989 action plan, *Gathering Strength: Canada's Aboriginal Action Plan*,¹⁹ the government of Canada outlined its fundamental objectives in light of the Report of the Royal Commission on Aboriginal Peoples. These included the promotion of First Nations self-

¹⁸ A.R., Vol X, pp.1791-1792.

¹⁹ Indian and Northern Affairs Canada, *Gathering Strength: Canada's Aboriginal Action Plan* (Ottawa: Minister of Public Works and Government, 1997), online: http://www.ainc-inac.gc.ca/gs/chg_e.html (date accessed, Nov 8, 2007).

government and self-reliance and developing treaty relationships. All of these objectives were promoted by the Aboriginal Fisheries Strategy, and its derivative, the Pilot Sales Program.

18. The future development of political arrangements between Canada and First Nations must take into account the judicially recognized rights of First Nations. But, this is not where such arrangements must end. The promotion of the economic and political development of First Nations, in cooperation with other orders of government, should not require either party to demonstrate the existence of particular rights, through the courts or otherwise. For example, land claims negotiations involve resolving a bundle of rights, whose scope and content may be uncertain or contested, with a new and well-defined set of s. 35 rights. The latter may include rights that the courts would not have previously recognized. The parties should be free to set aside potentially divisive or distracting debates over existing legal rights and focus on reaching agreements for the future.

19. The Supreme Court of Canada, in *Reference re Same-Sex Marriage*,²⁰ spoke of legislation that reflects “*Charter* values”: legislation that is not necessarily compelled by the *Charter*; but promotes its principles. Similarly, the AFN submits, the government of Canada is generally entitled to devise and implement laws and policies that promote “section 35 values”, including the recognition of historic practices, reconciliation of the interests of First Nations and the larger community, and the value of consultation, negotiations and agreements.

20. The *Charter* should not be used to preclude the federal government from exercising its discretion in recognition of the historic importance of fishing to First Nations, their aspirations to continue it, as an integral aspect of their way of life, and their ongoing conviction, notwithstanding any particular court decision in any individual case, that doing so is a matter of legal right. Such recognition and reconciliation is frequently based on delicate negotiations between the parties, and may well be preliminary to self-government agreements. In fact, the

²⁰ *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698.

Tsawwassen First Nation did enter into a self-government agreement, which has provisions, among other things, for substantial authority with respect to fisheries.²¹

Economic Self-sufficiency and Self-governance as a Dynamic and Evolutionary Process

21. It is important for the federal and provincial governments, in the dynamic and ongoing process of achieving reconciliation with First Nations, to be able to test innovative initiatives that may be a building block to further developments.

22. The instant case involves highly complex issues with respect to fisheries; the Pearse/Larkin Report²² describes management of pacific salmon as “one of the world’s most complex problems in fisheries management.” Sound policy must reflect evolving international law; the development of First Nations law, through litigation and inter-government agreements; and the balancing of many competing interests, including those of First Nations, sport fisheries, environmental and conservation concerns.

23. The larger context for resolving fisheries issues includes the identification of rights through agreements, the promotion of economic self sufficiency, and the recognition of substantial self-governance for First Nations. The negotiation of agreements can take many years. It is reasonable and prudent for other governments and First Nations to negotiate time-limited agreements and incorporated lessons learned into further agreements, which may include constitutionally-protected modern land claims agreements. The Tsawwassen First Nation Final Agreement, ratified in 2007, includes self-government rights of the First Nation, including authority over fishery matters.

24. The agreements in this case are replete with references to their experimental nature. The contested program is labeled “Pilot Sales Program.” A 1992 Department of Fisheries and Oceans

²¹ Tsawwassen First Nation Final Agreement, signed by all parties on December 8, 2006, online: http://www.gov.bc.ca/arr/firstnation/tsawwassen/down/final/tfn_fa.pdf (date accessed, Nov 6, 2007). Bill 40 - 2007 Tsawwassen First Nation Final Agreement Act.

²² “Pearse/Larkin Report,” AR, Vol. X, p. 1696-1735.

publication refer to the “demonstration projects”.²³ In 1993, the Minister of DFO referred to learning “on an experimental basis” whether “this is a better way to do it, because we don’t want the B.C. fishing industry wrecked by years of litigation.” He added “we are going to stick to these three sales arrangements to see if everything works better this year than last year, and then we can consider some expansion in later years.”²⁴ As a federal official testified “at that time we were just embarking on a treaty process as well, and the purpose behind the pilot sales was to test elements of the sales of fish that may be incorporate into the treaties.”²⁵

25. The Appellants submit that there is evidence that the Pilot Sales Program did not achieve all of its intended purposes. The Respondents, with whom the AFN agree, say the impacts were positive. In any event, the AFN submits that it is not necessary, in the face of a s. 15(1) challenge, to show that a program with legitimate objectives achieved all of them. While a *Charter* analysis may take into account effects as well as intentions, the AFN submits that it is also reasonable to consider the experimental nature of a program, and the complexity of the area to which it is addressed. Other governments and First Nations must have reasonable leeway to innovate, experiment and test new arrangements.

Section 25

26. The AFN submits that section 25 is applicable in this case. Section 25 of the *Charter* recognizes that First Nations may have a wide range of distinctive constitutionally protected rights, and that other provisions of the *Charter* should be construed in a manner that is respectful of them. The AFN makes no submission with respect to the operation of s. 25 in an “intramural” case - one involving a complaint by a member of a First Nation that internal policies are not operating fairly. The “rights” in question, in this case, pertain to legislation, agreements and licenses that confer distinctive rights of governance and fishing allocations in the context of promoting self-sufficiency and self-governance and working towards modern land claims agreements. The interpretive direction in s. 25, with respect to the construction of other

²³ Reasons of Kitchen, P.C.J., A.R. Vol I, pp. 20-21, para. 45.

²⁴ Reasons of Kitchen P.C.J., A.R. Vol I, pp. 21-22, para. 47.

²⁵ J. Ionson, October 17, 2002, A.R. Vol III, p. 535, lines 10-29 and p. 535, lines 24-47.

provisions of the *Charter* including s. 15, reinforces the conclusion in this case that the Pilot Sales Program is valid.

PART IV: SUBMISSIONS CONCERNING COSTS

27. The AFN has no submission on the matter of costs.

PART V: ORDER REQUESTED

28. The AFN adopts the submissions of the Respondents

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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PART VI – TABLE OF AUTHORITIES

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<i>Corbiere v. Canada (Minister of Indian and Northern Affairs)</i> , [1999] 2 S.C.R. 203	3
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PART VII – STATUTES AND REGULATIONS

	Paragraph reference
<i>Constitution Act, 1867</i> (U.K.), 30 & 31 Vict., c, 3, reprinted in R.S.C. 1985, App. II, No. 5	6
<i>Constitution Act, 1982</i> , being Schedule B to the <i>Canada Act 1982</i> (U.K.), 1982, c. 11	6, 9
<i>Indian Act</i> , R.S.C. 1985, c. I-5	9, 13, 14
<i>The Nisga’a Final Agreement Act</i> , S.C. 2000, c. 7	9
<i>Westbank First Nation Self-Government Act</i> , S.C. 2004, c. 17	9